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A Web cast

“Joint Ventures:

A Way for Small Business to Compete for Federal Contracts”

Northwestern Division

SBA

What we are going to cover today

1. **Introduction: Teaming in the FAR and the SBA definition of a joint venture**
2. **Size standards, affiliation, and exceptions**
3. **Limitations on subcontracting and ostensible subcontracting**
4. **Joint ventures and types of small business**
5. **Mentor protégé and 8(a)**
6. **What Next?**

“Teaming” helps small business to compete in unrestricted competition and set-asides

It is the policy of the Government

to place a fair proportion of its acquisitions with

- small business,
- small disadvantaged business (SDB and 8(a)),
- Historically Underutilized Zone (HUBZone) small business,
- women-owned and
- Service disabled veteran-owned business concerns (SDV).

- Small Business Act

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FAR 9.601: "Contract team arrangement" refers to

- (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

- (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

Applies to large and small

"Teaming" as a term is being eliminated

SBA definition of a joint venture (JV)

SBA size regulations (13 CFR 121.103(h))

A joint venture is -

- an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied,

- consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period,

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SBA definition of a joint venture (JV)

- Combining efforts, property, money, skill, or knowledge,
- But <u>not on a continuing or permanent basis</u> for conducting business generally.

A joint venture, consists of two or more companies combining their resources <u>to form a new company</u>, as a <u>separate entity</u> from the existing companies, for the purpose of performing a contract.

Once the contract is completed, the joint venture is <u>dissolved</u> along with the new company that was formed to perform the contract.

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Are you small for a particular acquisition? Self-certify

- NAICS (North American Industry Classification System) code
- Corresponding code for the acquisition
- Size eligibility determined by revenues or employees
- Three year average annual revenues
- Number of employees over the last 12 months

Are you small for a particular acquisition? Self-certify

Finding code descriptions:

http://www.census.gov/epcd/naics02/naicod02.htm

Finding size standards for a NAICS code:

http://www.sba.gov/size/sizetable2002.html

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Affiliation means ability to control:

Revenues or employees are combined to determine size

(See SBA size regulations at 13 CFR 121.103)

- Power to control
- Common managers
- Identical business Interests
- Common stockholders
- Ownership of multiple businesses
- Contractual relationships
- Joint venture arrangements: Size regs at 13 CFR 121.103(h)(2):

Exceptions for bundled contracts and large procurements:

When affiliation regs are "relaxed" for joint ventures:

Where eligibility is 13 CFR 121.103(h)(3)

1. Bundled procurement of any dollar value.
2. Large procurement:
   (a) Revenue based size standard: the dollar value of the procurement, including options, exceeds half the size standard of the procurement.

   (b) Employee based size standard: dollar value of the procurement, with options, is over $10 million.

Note: Due to competitiveness demonstration, there are no small business set-asides in construction valued at over $25,000. FAR 19.10. You may still joint venture.

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Case 1: JV on a small business service set-aside without relaxed affiliation regs

- Small business A: Can only perform 25% of the job with its own people.
- Small business B: Can only perform 25% of the job with its own people.
- Neither A nor B can bid the job alone.
- Combined revenues fall within small size standard
- Affiliation is not relaxed since the procurement 1) is not bundled, 2) is not greater than half the size of the size standard (for revenue-based size standards) and 3) is not greater than $10 million (employee size standard) .
- As joint venture, they perform the <u>required 50%</u> with their own people and subcontract the other 50%, so bid the job.

Case 2: JV and relaxed affiliation regs

- Small business set aside.
- Engineering services NAICS: 541310
- NAICS code 541310 size standard: $4 million.
- Joint venture (affiliates) combined receipts: $5 million:
  1. Small business A – 10% (average annual receipts $1M)
  2. Small business B – 35% (average annual receipts $3M)
  3. Small business C – 10% (average annual receipts $1M)
- Estimated value of contract award: $3.5 million.
- Estimated value exceeds half of size standard: $2 million.
- So JV affiliation is waived (relaxed).

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For set-asides, a business or JV can subcontract only so much (FAR clause 52.219-14)

Services Provide 50% of personnel costs	**Supplies** Provide 50% of cost of manufacturing, excluding materials
General Construction Perform 15% of cost of contract with own employees, excluding materials	**Special Trade Construction** Perform 25% of cost of contract with own employees, excluding materials

HUBZone regs at 13 CFR 126.7OO place further subcontracting restrictions on HUBZones: One or more HUBZones must spend at least 50% of the cost of the contract incurred for personnel on its own employees or employees of another qualified HUBZone.

Ostensible subcontractor: When a subcontractor is treated as an affiliate for size determination

(SBA size regs at 13 CFR 121.103(h)(4))

- A subcontractor that performs primary and vital requirements or a subcontractor upon which the prime contractor is unusually reliant.
- Applicable for the various types of small business set-asides only, with exceptions for HUBZone and SDB JVs in unrestricted competition.
- If an apparent low offer on a set-aside is what appears to be an ostensible subcontractor, referral is made to SBA per FAR 19.302.

A Seven Factor Test for Identifying a Possible Ostensible Subcontractor

1. Who will manage the contract?
2. Which party possesses the requisite background and expertise to carryout contract?
3. Who “chased” the contract?
4. What degree of collaboration was there on the bid?
5. Are there discrete tasks to be performed or is there a commingling of personnel and materials?
6. What is the relative amount of work to be performed by each?
7. Which party performs the most complex and costly contract functions

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TYPE OF SMALL BUSINESS JV	Sole source	Competitive set-aside	Limitations on subcontracting	Relaxed limitations for bundles larger procurements	Ostensible subcontracting scrutiny
Small Business	No	Yes	Yes	Yes	Yes
8(a)	Yes	Yes	Yes	Yes	Yes
Small disadvantaged business (SDB)	No	No	NA	NA	NA
Women	No	No	NA	NA	NA
HUBZone	Yes	Yes	Yes	Yes	Yes
Vet	No	No	NA	NA	NA
SDV	Yes	Yes	Yes	Yes	Yes

SMALL BUSINESS JV IN UNRESTRICTED COMPETITION	Limitations on subcontracting	Ostensible subcontracting scrutiny	Price Evaluation Preference	Large bus. subcontracting goal
Small Business	No	No	No	Yes
8(a)	No	No	No	No
SDB	**Yes**	**Yes**	**Yes (non-DoD)**	**Yes**
Women	NA	NA	NA	Yes
HUBZone	**Yes**	**Yes**	**Yes**	**Yes**
Vet	NA	NA	NA	Yes
SDV	No	No	NA	Yes

JV scenarios

1. Unrestricted Competition: Relaxed affiliation may be applicable	Small business: JV with small firms only. Not subject to limitations on subcontracting or ostensible subcontracting scrutiny. HUBZone: JV consisting of HZ firms qualifies for 10% price evaluation preference over large firms, and is subject to limitations on subcontracting and ostensible subcontracting scrutiny. See FAR 52.219-4: Notice of Price Evaluation Preference for HUBZone Small Business Concerns 8(a) SBA-approved mentor-protégé JV: Not subject to limitations on subcontracting or ostensible subcontracting scrutiny. Considered small even if JV is with large business. SDV JV: No advantage for SDV JVs in

JV scenarios

1. Unrestricted Competition: Relaxed affiliation may be applicable	<u>Small disadvantaged business (SDB) JVs</u> exist only in **<u>non-DoD</u>** unrestricted competition. SDB is SBA-certified. All 8(a)s are SDBs. SDB JV formed per SDB regs at CFR 124.1002(f). Consists of at least one SDB with other small business. SDB employee must be project manager responsible for performance. Eligible for a 10% price evaluation preference over all firms. Limitations on subcontracting and ostensible subcontracting scrutiny. See FAR 52.219-23: Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

JV scenarios

2. Small business set-asides (except construction per FAR 19.10)	Small firms only. Affiliation requirements relaxed for large procurements. Formed by any sort of small business outside of certifications (SB, 8(a), HZ or SDVs). Limitations on subcontracting apply. Ostensible subcontractor scrutiny. 8(a) SBA-approved mentor-protégé JV may compete. Is considered small even if JV is with large business. Subject to limitations and ostensible subcontractor scrutiny.

JV scenarios

3. 8(a) sole source or competitive	SBA must have approved the joint venture agreement. Competes only for 8(a) procurements. At least one firm is 8(a)-certified and less than one half the size standard corresponding to the NAICS code assigned to the contract. 8(a) firm must manage and furnish project manager and earn 51% of profits.

(8(a) regs at 13 CFR 124.513)

8(a) JV resource

JV scenarios

3. 8(a) sole source or competitive **(8(a) regs at 13 CFR 124.513)**	Are considered to be affiliated for size purposes – unless affiliation regs are relaxed because of size of contract. Government can award 8(a) contracts to JV but contract award must be made in the name of the 8(a) JV. Limitations on subcontracting apply. Ostensible subcontractor scrutiny. See special requirements in CFR requirements regarding 8(a) qualifications to joint venture.

JV scenarios

4. HUBZone set-aside	JV consists of HZ firms only. Limitations on subcontracting apply. 50% of the cost of personnel must be performed by HUBZone firms. See FAR 52.219-3: Notice of Total HUBZone Set-Aside Ostensible subcontractor scrutiny.
5. Service-disabled vet set-aside	JV with small firms only. JV formed per regs with SDV managing partner and SDV receiving 51% of profits. Limitations on subcontracting and ostensible subcontractor scrutiny apply. See FAR 52.219-27: Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside

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Federal agencies with small business mentor-protégé programs for SDB, HUBZones, SDVs and sometimes women-owned small businesses

- Department of Defense:

  http://www.acq.osd.mil/osbp/doing_business/index.htm
- Department of Homeland Security:

  http://www.dhs.gov/xopnbiz/smallbusiness/editorial_0716.shtm
- Department of State:

  http://www.state.gov/m/a/sdbu/c14690.htm
- Department of Energy:

  http://smallbusiness.doe.gov/Small_Business_Programs/Mentor-Protege/mentor-protege.html
- Department of Treasury:

  http://www.ustreas.gov/offices/management/dcfo/osdbu/mentor-protege/

SBA's mentor-protégé program is for 8(a) only and may result in a JV with a large business

- Small Business Administration
  http://www.sba.gov/8abd/indexmentorprogram.html
  http://www.sba.gov/dc/dc_8amp.html

- Mentor protégé approval made at SBA headquarters with cooperation of the protégé's SBA district office

- A resulting joint venture is approved at the protégé's SBA district office

- 8(a) JV is in place at the time of submission of proposal for agency review - as with all JVs

Case 3: Unrestricted DoD competition

SITUATION: Unrestricted competition

Industrial Building Construction NAICS code 236210

NAICS code 236210 size standard: $31 million

Estimated value over half the size standard: $16 million

Affiliation rules relaxed

No subcontracting limitations or ostensible subcontracting scrutiny except for HUBZones JVs

BIDDER SCENARIOS:

1. Small business A will bid on the contract alone.
2. Joint Venture B of two small businesses firms.
3. Joint venture D consists of two HUBZone firms. Qualifies for 10% price evaluation preference (PEP) vs. large firms only.
4. Joint venture F forms consisting of SBA 8(a) mentor-protégé JV consisting of an 8(a) with a large business.

SDB joint ventures are not eligible for PEP on DoD contracts. There is no incentive for SDVs to form joint ventures in unrestricted competition.

Summary of CFR regulations

- SBA size regulations: 13 CFR 121.103(h)
- HUBZone regs: 13 CFR 126.616
- Service-disabled veteran: 13 CFR 125.15(b)
- 8(a) and SDB regs: 13 CFR 124.513
- Small disadvantaged business: 13 CFR 124.1002(f)

CFR website:

http://www.access.gpo.gov/nara/cfr/waisidx_06/13cfrv1_06.html

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Benefits for your business

- Compete for larger more technically complex contracts.
- Compete with larger firms.
- Combine capabilities and past performance.
- Experience strategic, long-term growth.

Federal government:

- Maintains competition from small business.
- Invests in the economy through small business participation.

Make the joint venture (JV) your commitment to success

- Research JV partner
- Compatibility
- Commitment
- Communications and understanding of expectations
- Periodic review of agreements
- Close geographic proximity

Topics contained joint venture agreement

- Purpose and scope of agreement
- Legal organization
- Authorized representatives
- Management and performance clarity
- Handling substitution or addition of co-venturers
- Procedures for disputes
- Termination provisions

Use your attorney

An 8(a) firm should contact its SBA office for 8(a) MP and JV

Procurement Technical Assistance Center:

http://www.dla.mil/db/procurem.htm

Federal agency may wish to review your agreement

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